No. 200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, ETC., ET AL.,

Petitioners,

vs.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT, BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION.

BERNARD M. SAVAGE,
Title Building,
Baltimore, Maryland,

Attorney for Respondent, Brotherhood of Railroad Trainmen.

The Daily Record Co. Print, Baltimore

INDEX

TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 200.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, ETC., ET AL.,

Petitioners,

vs.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT, BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION.

OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals reported in 141 F. (2nd) 366 will be found in the printed record at pages 113-115 and the judgment and order of the District Court (D. C.) at page 89.

JURISDICTION.

The jurisdiction of this Court is invoked by the petitioners under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. Section 347 (a).

STATUTE INVOLVED.

The pertinent provisions of the Railway Labor Act, as amended by the Act of June 21, 1934 (45 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix to this brief.

COUNTERSTATEMENT.

The Petitioners pray a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this cause on March 27, 1944, dismissing the petitioners' appeal as to the Pennsylvania Railroad Company (hereinafter called Pennsylvania) and the Brotherhood of Railroad Trainmen (hereinafter called BRT).

> "No review is sought of the Court of Appeals' judgment in so far as it dismissed the petitioners' appeal as to the National Mediation Board and its members." (Pet. 1.)

The separate motions to dismiss filed by each appellee were based upon the three following cases decided by this Court on November 22, 1943 subsequent to the petitioners' appeal:

General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co., 320 U. S. 323;
General Committee of Adjustment v. Southern Pacific Company (General Grievance Committee v. General Committee of Adjustment) 329 U. S. 338, and
Switchmen's Union of North America, et al., v. National Mediation Board, Brotherhood of Railroad Trainmen, et al., 320 U. S. 297.

The appeal was taken from the judgment and order entered on June 11, 1943 by the District Court of the United States for the District of Columbia dismissing petitioners' complaint, amended complaint and denying motion for summary judgment (R. 89). The petitioners' (Order of Railway Conductors, an unincorporated association, and four of their officers, hereinafter referred to as ORC) original complaint filed on November 25, 1942, asked for declaratory and injunctive relief against the Pennsylvania and the BRT but the Board or its members were not made parties defendant. The amended complaint which added the Board and its members as parties defendant was filed on January 7, 1943, and attempted to have set aside an election conducted by the Board among the road conductors on the Pennsylvania lasting from December 5 to December 19, 1942, and also sought to set aside the Board's certification of December 27, 1942 (par. 45, R. 20):

> "That the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent the craft or class of road conductors employed by the Pennsylvania Railroad for the purposes of the Railway Labor Act." (R. 75-76).

In addition it sought to enjoin the Board from holding any other election until it found that certain alleged practices did not constitute unlawful influence or coercion within the meaning of the Railway Labor Act and further prayed that in the alternative the court declare that the practices complained of against the Pennsylvania Railroad constituted unlawful interference, influence or coercion and asked that the defendant Mediation Board be enjoined from holding an election, etc., until after the Board finds that such alleged interference, influence, etc., has ceased. The court was also asked to declare, that certain contractual provisions entered into by the Pennsylvania R. R. and

the BRT prior to the election, be declared void because covering road conductors allegedly included in the ORC's contract, and that the ORC be declared as the accredited representative of the conductors, to have the exclusive right to negotiate and bargain collectively for the road conductors (R. 20-21-22).

The amended bill of complaint and record shows the following. In April of 1927 the ORC representing Pennsylvania road conductors, Pennsylvania and BRT entered into a joint schedule or contract, which was entered into jointly because the work of road conductors and road brakemen were closely related; the BRT for a long time represented road brakemen, yard conductors, yard brakemen, baggagemen and switch tenders (Amended Complaint, hereinafter referred to as A. C., par. 11, R. 5).

On April 18, 1941, Pennsylvania served notice upon the ORC and BRT in compliance with the Railway Labor Act of its desire to change certain regulations. Joint conferences pursuant thereto were held (par. 12, A. C., R. 5) until petitioner, ORC, served written notice of its withdrawal dated August 3, 1942 (par. 14, A. C., R. 7).

On August 14, 1942, Pennsylvania and BRT signed an agreement covering yard conductors, road and yard brakemen, baggagemen, assistant conductors or ticket collectors and switch tenders[1] which contract included paragraph P-A-1 covering assistant conductors or ticket collectors,[2] (par. 15, A. C., R. 7-8) and par. 5.N-5 and 5.N-6 (R. 9-10-11) covering the displacement of brakemen, baggagemen and switchtenders by road conductors on the extra list.

---

[1] Road and yard brakemen, baggagemen and switchtenders were and are admittedly represented by the BRT (A. C., par. 11, R. 5).

[2] Although alleged (pet. 5) a new class of employees created and included in contract of August 17, 1942, viz.: assistant conductors, rates of pay for this class were specified on p. 41 of joint contract between Pennsylvania, BRT and ORC April 1, 1927 (R. 91).

5.N-6 (a) (A. C., par. 17, p. 11) specifies the manner of calling employees admittedly represented by the BRT for conductor vacancies when regular or extra conductors are not available.

On September 23, 1942, the BRT filed an invocation with the National Mediation Board asking that they be certified as the representative for the road conductors, which invocation was accompanied by the required authorizations (A. C., par. 34, R. 17 and R. 20).

On October 28, 1942, the ORC addressed a letter to the Mediation Board which purported to state in detail the events leading up to the invocation, and the allegation of coercion and influence (R. 23 to 33). This letter also objected to the holding of an election during war time because a large number of men, who formerly worked as brakemen and baggagemen were then working as promoted conductors and upon termination of the emergency would go back to brakemen, flagmen and baggagemen. This paragraph 4, beginning at R. 31, concludes at page 32 (R.):

> "An election at this time would place the balance of power with men whose positions as conductors will terminate at the end of the war."

On November 9, 1942, the Board replied to the ORC's letter and detailed the Board's reasons for finding it was not empowered to hold a formal hearing but invited a discussion with the plaintiff (R. 33 to 40). This discussion took place on November 13, 1942 (A. C., par. 38, P. 18).

On November 20, 1942, the ORC representatives agreed with the BRT representatives and the Mediation Board in writing that

> "To settle the dispute, should the National Mediation Board find that a dispute exists among the Road

> Conductors, employees of the Pennsylvania Railroad, and order an election, the eligible list of such Road Conductors entitled to vote in such an election shall be: * * *". (BRT Ex. D, R. 83-84-85),

and on December 2, 1942, agreed in writing to the list of eligible voters to be used in conducting an election by the Board (BRT Ex. E, R. 85-86), and on December 19, 1942, agreed that the election conducted by the Mediation Board from December 5, 1942, to December 19, 1942, which showed 3,283 eligible voters of whom 1,122 voted for the ORC and 1,680 for the BRT, was conducted in a fair and impartial manner and the secrecy of the ballots was kept inviolate to which said ORC representatives attested in writing (BRT Ex. F, R. 86-87-88); accordingly on December 27, 1942, the Board certified the BRT as the representative of the road conductors (R. 75-76).

On January 7, 1943 (3½ months after the BRT invocation[1]) four ORC officers filed an Amended Bill of Complaint for declaratory and injunctive relief against the Pennsylvania, the BRT and for the first time made the Mediation Board and its members parties defendant. After answers were filed by all parties, the ORC on March 8, 1943, made a motion for summary judgment (R. 65-66-67) to which answers were filed by all parties and on June 11, 1943, the following judgment and order was entered by the District Court (R. 89):

> "The above-entitled case, having come on for hearing on plaintiff's motion for a summary judgment; and the Court having considered the motion, defendants' answers thereto, affidavits of the parties, the pleadings and oral argument of counsel; and the Court being of the opinion that there is no genuine issue as to any material fact with respect to the relief requested under the motion for summary judgment, but

[1] BRT invocation filed with Board September 23, 1942 (R. 17).

the Court being of the further opinion that the facts admitted as true and all other facts alleged in the complaint and amended complaint of the plaintiffs, do not establish that the plaintiffs have any cause of action; it is by the court this 11th day of June, 1943,

ADJUDGED, ORDERED AND DECREED:

1. That the plaintiffs' motion for a summary judgment be and the same is hereby denied;

2. That the complaint and the amended complaint be and the same are hereby dismissed;

3. That costs are awarded to defendants.

s/ DANIEL W. O'DONAGHUE,

June 11, 1943. Justice."

From the District Court's action the ORC appealed to the Court of Appeals for the District of Columbia.

After briefs had been filed in this appeal, but before argument, the Supreme Court decided the *M-K-T*, *Southern Pacific* and *Switchmen's* cases, *supra*, which furnished the basis for three separate motions to dismiss the appeal filed by each appellee, the present respondents.

> "In opposing these motions, the petitioners conceded that under this Court's decisions in the above cases the District Court and the Court of Appeals may have had no jurisdiction to consider the issue raised by the motion for summary judgment—whether the election and certification should be set aside for the reason that the Board had conducted the election and certified the winner without first investigating or considering ORC's charges of carrier interference." (Pet. 8).

The Court of Appeals ordered printed briefs filed by all parties and held a hearing on the motions to dismiss on February 17, 1944. The three separate motions were granted, but the petitioners do not ask certiorari as to the Court's action in granting the Board's motion to dismiss.

The appellate Court based its dismissal on three grounds; first: That under the *Switchmen's* case the Federal Courts lacked jurisdiction to review in any respect the action of the Board in jurisdictional representative disputes; second: that even though there were allegations of influence affecting the electors, after the certification was made by the Board, the *Switchmen's* decision, *Brotherhood v. United Transport Service Employees* (320 U. S. 715), *M-K-T* and *Sou. Pac.* cases, foreclose the question presented and deprive the Courts of all rights of interference, and third: that the relief then being sought was bootless in the present situation.

QUESTIONS PRESENTED.

1. Whether or not, it being conceded by the petitioners that the Federal Courts have no jurisdiction to review the action of the Board for the purpose of setting aside its certification, the Federal Courts have the power to set aside said certification upon an allegation of conduct antedating the election alleged to have influenced the employees in their choice of a representative, when these identical charges were presented to the Board by the petitioner and when an additional remedy was provided by Section 2, Tenth of the Act?

2. Whether or not, in view of the decisions in the *Missouri-Kansas-Texas* case, the *Southern Pacific* case, and the *Switchmen's Union* case to the effect that the determination by the Board is conclusive and that jurisdictional disputes between labor organizations do not present justiciable issues under the Railway Labor Act, the action of the Court of Appeals in dismissing the petitioners' appeal is correct?

3. After raising no objection to the correctness of the appellate court's action in granting the Board's motion to dismiss the appeal by acknowledging the Board's action is not subject to review in issuing a certification, do the Courts have jurisdiction to annul the Board's certification when the Board is no longer a party to the proceedings by virtue of said dismissal?

ARGUMENT.

I.

The Courts have no jurisdiction under the Switchmen's Union decision to strike out the Board's certification, even though judicial consideration be asked of a part of the matter, which the Board ruled it had no jurisdiction to consider.

It is the petitioners' principal contention even though admitting the Mediation Board's action in certifying the BRT cannot be reviewed, that because the Mediation Board ruled it had no jurisdiction to consider alleged coercion ante-dating the election, the Court can consider this and if found to exist and to have influenced the conductors in their choice, can strike out the certification. This argument is apparently based upon the theory that without the Court's intervention the Petitioners' right under Section 2, Third, would be "sacrificed or obliterated".

In the *Switchmen's* case the petitioners sought to have the determination by the Board of the participants and the certification of representatives cancelled.

> "But in addition an injunction against the Brotherhood and the carriers was asked to restrain them from negotiating agreements concerning the craft of yardmen on the carriers' lines." (320 U. S. at p. 310).

This relief was asked by the Switchmen because it was alleged they were forced to participate in an invalid carrier-wide election. The Board had held that the

> "Railway Labor Act vests the Board with no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, and the argument that it has such power fails to furnish any basis of law for such administrative discretion." (320 U. S. at p. 309).

The Court of Appeals reviewed the matter on its merits and it was pointed out by Mr. Justice Rutledge in the dissenting opinion (135 Fed. 2nd, at p. 802):

> "In my opinion the Board, when it decided as a matter of law that the statute requires carrier-wide crafts as the voting unit, whenever the dispute raises that question, failed to exercise the judgment which the statute calls into play".

In this situation this Court could have reviewed the Board's decision or could have sent the matter back to the Board in order that it might have exercised its discretion to determine the craft or class on less than a carrier-wide basis. Instead, however, this Court reversed and held at 320 U. S. p. 300:

> "We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate."

The opinion further found at pages 300 and 301:

> "The Act, Section 2, Fourth, writes into the law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act' *that*

right, is protected by Section 2, Ninth, which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. (emphasis supplied.)

"* * * A review by the Federal District Courts of the Board's determination is not necessary to preserve or protect that 'right'. Congress for reasons of its own, decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fixed the tool which it deemed suitable to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. * * * In such a case the specification of one remedy normally excludes another".

There is little if any distinction in the proposition urged in the case at issue and the *Switchmen's* case where the Board ruled that it had no *discretion to split a carrier* for the purpose of recognizing groups who had bargained under one contract for a long period of years as a separate class or craft and the present case where the Board ruled it had no *jurisdiction* to consider coercion ante-dating the actual holding of an election. Since this Court in the *Switchmen's* case considered that the right was given, under Section 2, Fourth, to have designated the appropriate crafts or class, incident to whom might participate in an election under this Section, and if it considered that the Board failed to exercise its duty on the theory that it had no jurisdiction "to split a carrier" this court, should the petitioners' theory be correct, would have permitted the Federal Court to have considered the right given by Section 2, Fourth.

This Court held, however, at page 303:

> "Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain".

II.

The decisions in the M-K-T and Southern Pacific cases conclusively determine that the issues presented in this case are not justiciable.

It is claimed by the petitioners that the effect of the Pennsylvania's dealing with the BRT as to road conductors was coercive. In the letter of protest sent by the ORC to the Board they stated (A. C. par. 37, R. 17):

> "That the said protest of the plaintiffs charged that the Penn RR was interfering with, influencing and coercing the said conductors in their choice of a bargaining representative by unlawfully bargaining with the BRT with respect to working conditions of the craft or class of road conductors,* by infringing upon the jurisdiction of the ORC, by breaching an existing contract between the Penn RR and ORC. * * *".

This Court in the *General Committee, etc. v. Southern Pacific*, 320 U. S. at p. 342, states as follows:

> "They point out that Section 2, *Third* and Fourth prohibit the carrier from *influencing employees in their choice of representatives.* The argument is that a contract by the carrier with the Engineers giving the latter the exclusive right to represent engineers in the presentation of their individual claims would

* The alleged infringement of the ORC contract however goes only to assistant conductors and alleged control of the conductors extra board. (A. C. par. 27, R. 15.)

In effect *coerce* all engineers into joining that union in violation of *Section 2, Third and Fourth*." (emphasis supplied.)

After discussing the history of the Act, this Court said at p. 342:

> "All of these would be relevant data for construction of the Act if the courts had been entrusted with the task of resolving this type of controversy. But we do not think they were. * * * For the reasons states in our opinions in the Missouri-Kansas-Texas R. Co. case and in the Switchmen's case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others."

This Court held that the "right" given by Section 2, Fourth, is protected by Section 2, Ninth and a review by the Courts of the Board's determination is not necessary to protect that "right". *Switchmen's* case, 320 U. S. at 300-301. Since Section 2, Ninth, authorizes the Board to

> "* * * to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier".

the right claimed by the petitioner under Section 2, Third, is protected by Section 2, Ninth and a determination by the Courts is not necessary to preserve or protect that right. It is claimed by the petitioner in the present case and pointed out in the *Switchmen's* case that these "rights" were not considered by the Board in the *Switchmen's* case

because the Board ruled it had no discretion to 'split a carrier' and in the present case because the Board ruled it had no jurisdiction to consider alleged coercion ante-dating the holding of an election.

Indeed the petitioners had additional means of protecting that right by proceeding under Section 2, Tenth and since it was claimed that coercion resulted because of the failure of the Pennsylvania to deal with them as the exclusive representative of road conductors as well as delaying conferences, the petitioners could have invoked the services of the Mediation Board under Section 5, First. (BRT appendix.)

III.

The Board's certification of the B. R. T. as the representative for the road conductors which admittedly is not subject to review leaves the petitioners who filed the Amended Bill of Complaint, representing no one but themselves and therefore having ceased to represent the employees involved, the charges of coercion and influence are now moot.

The Court of Appeals besides determining (R. 114) that under the *Switchmen's* case the Federal Courts lacked jurisdiction to review in any respect the action of the Board in jurisdictional representative disputes and that in the case of *Brotherhood v. United Transport Service Employees*[1] the Supreme Court went further and extended the prohibition against judicial review to cases where the action of the Board was said to be clearly arbitrary, held as follows (R. 115):

> "The prayer for injunctive relief against the Railroad, growing out of its alleged policy of coercion, which counsel continue to press, even if it be conceded the District Court has jurisdiction to grant the relief

[1] 320 U. S. 715.

asked, would be bootless in the present situation, since it is not alleged that coercion is continuing now, for the dispute which it is claimed gave it birth is over and done with, the controversy conclusively ended and put to rest by the Board's certification, and there is no reason to suppose there will be another request for an election".

It cannot be denied that the ORC and the four officers, who filed the amended bill of complaint have standing in this court only as the representative of the road conductors, however since by virtue of the certification the BRT represent the road conductors the petitioners have no standing to complain. An examination of the Railway Labor Act clearly shows that the only rights conferred, are those upon employees and since the BRT is now representing these employees, the petitioners cannot appear in a representative capacity.

Particularly is this true since the petitioners raised no objection to the Board's motion for dismissal and the Board is no longer a party to the proceedings. The claim that the Courts have jurisdiction to strike out an election and certification proceeding conducted by the Board, the investigation lasting from November 2, 1942 (R. 40) to December 2, 1942, and the election itself lasting from December 2, 1942 to December 19, 1942 inclusive (R. 86) involving the eligibility of thousands of employees and the secret polling of thousands of employees all over the Pennsylvania Railroad without the Board being a party to the attempted certification annulment, presents a most unusual situation and were it to be allowed in this case a precedent would be established, which would tend to defeat the purposes of the Railway Labor Act.

If the ORC deems that the election was held at a time when the balance of power was with respondent, BRT, be-

cause a large number of brakemen represented by the latter organization were working as conductors due to the heavy increase in traffic, they have a right, should they so desire to invoke the services of the Mediation Board for the purpose of holding another election but until they are certified by the Board as representing the road conductors, the ORC under the *Switchmen's* decision has no standing to complain on behalf of employees they do not represent.

CASES RELIED UPON BY PETITIONERS.

The petitioners rely under their "reasons for granting the writ" (pet. 11) upon the contention that the decision of the Court of Appeals is contrary to the decision in *Virginian Railway v. Federation*, 300 U. S. 515, and *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548. They further state that the decision of the Court of Appeals does not give proper effect to the decision of this Court in the *Switchmen's* case, *General Committee v. M-K-T R. Co.* and *General Committee v. Sou. Pac. Co.* An analyzation of the *Texas v. Ry. Clerks* case which was decided first in point of time (May, 1930), shows that the clerks' organization was recognized by the railroad as representing a majority of the clerks from the time of its organization in 1918 until after the clerks organization made application for an increase in wages. After the Texas denial of a wage increase the clerks referred the matter to the Mediation Board and while the matter was pending before the Board the railroad instigated the formation of a rival organization. Even though the District Court granted a temporary injunction, the railroad company thereafter recognized the so-called union formed by it and refused to recognize the Clerks' organization. The matter came up on a contempt proceeding against the railroad and certain of its officers, and

* Facts given in Court's Opinion 281 U. S. 555, 556, 557, 558.

on final hearing the temporary injunction was made permanent, and a motion to vacate the order in the contempt proceedings denied; all of which was affirmed on appeal and this Court granted certiorari. Mr. Justice Hughes, who delivered the Opinion of the Court, pointed out (P. 560) that those employees soliciting authorizations for the association sponsored by the railroad were permitted to devote their time to that enterprise without deduction from their pay and charge their expenses to the railroad company. They made reports of their progress to the company and as stated in the opinion at p. 560:

> "* * * The discharge from the service of the Railroad Company of leading representatives of the Brotherhood and the cancellation of their passes, gave support, despite the attempted justification of these proceedings, to the conclusion of the courts below that the Railroad Company and its officers were actually engaged in promoting the organization of the Association in the interest of the Company and in opposition to the Brotherhood, and that these activities constituted an actual interference with the liberty of the clerical employees in the selection of their representatives. * * *"

The then Chief Justice states in the opinion at p. 568:

> "The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis.* Virginia v. Tennessee, 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization'."

The Clerk's case was decided before the 1934 Amendments to the Act empowering the Board to protect the right given under Section 2, Third, by the additions of Section 2, Ninth, and the addition of Section 2, Tenth, providing criminal penalties for the violation of Section 2, Third, etc. But for the injunctions asked of the Court, the Clerks would have been entirely without remedy even though their leaders were being discharged and their passes taken away for activity in favor of their organization.

This case serves a useful purpose to illustrate that Section 2, Third is not to be construed as interdicting the normal relations and innocent communications between employer and employee.

Nobody is contending in the present case that the Pennsylvania ever threatened discharge or the revocation of pass privileges. Indeed the complaint is based on conversations between Pennsylvania representatives and ORC representatives and the alleged coercive effects caused by the Pennsylvania and BRT agreement as to assistant conductors and the maintenance of the extra board. The latter proposition was almost the identical proposition considered by this Court in the *Sou. Pac.* case.

In the *Virginian Ry. Co. v. System Federation*, as the petitioners point out on page 15 of their brief was a suit brought under the Railway Labor Act as amended in 1934 to compel the carrier to treat with the plaintiff, *the certified representative* of the craft of the carrier's employees as required by Section 2, Ninth, and to enjoin the carrier from interfering with, influencing or coercing its employees in their choice of a representative in violation of Section 2, Third, which relief the District Court granted and was affirmed on appeal.

Mr. Justice Stone pointed out (300 U. S. at p. 539) that the petitioner (Virginian Ry.)

> "* * * had failed to treat with the Federation as the duly accredited representative of petitioner's employees; that petitioner had sought to influence its employees against any affiliation with labor organizations other than an association maintained by petitioner, and to prevent its employees from exercising their right to choose their own representative; that for that purpose, following the certification, by the National Mediation Board, of the Federation, as the duly authorized representative of petitioner's mechanical department employees, petitioner had organized the Independent Shop Craft Association of its shop craft employees, and had sought to induce its employees to join the independent association, and to put it forward as the authorized representative of petitioner's employees."[7]

The opinion further states (p. 541):

> "Petitioner here, as below, makes two main contentions: First, with respect to the relief granted, it maintains that Section 2, Ninth, of the Railway Labor Act (45 U. S. C. A., Sec. 152, Subd. 9), which provides that a carrier shall treat with those certified by the Mediation Board to be the representatives of a craft or class, imposes no legally enforceable obligation upon the carrier to negotiate with the representative so certified, and that in any case the statute imposes no obligation to treat or negotiate which can be appropriately enforced by a court of equity". * * *

The distinction between the case at issue and the *Virgianian* case is obvious. In the latter the Court was deal-

---

[7] The court found that after the certification by the Mediation Board "The defendant, undertook circulation of a petition addressed to the Board to have this certification altered to deprive its employees of the right to representation by said System Federation, and thereafter did cause the Independent Union to be organized notwithstanding the certification".

[8] The second contention was the defense based upon the allegation that the shop employees were not engaged in interstate commerce.

ing with a company union and the Virginian refused to treat with or recognize with the Federation certified by the Mediation Board. In this situation Section 2, Tenth, afforded no remedy because penalties were provided only for the failure of the carrier to comply with the terms of the third, fourth, fifth, seventh or eighth paragraphs of this Section, Section 2, Ninth, which states *inter alia*:

> "Upon receipt of such certification the carrier *shall treat* with the representatives so certified as the representative of the craft or class for the purposes of this Act." (emphasis supplied)

was omitted from Section 2, Tenth. It is therefore apparent that without the injunctive relief granted by the equity court the defense offered by the company that Section 2, Ninth, imposes no legally enforcible obligation upon the carriers to negotiate with the representatives so certified, would have been perfectly good and valid and the entire certification proceeding would have been simply a *suggestion* to the carrier to treat with the certified representatives.

The petitioners in the *Virginian* case offered no defense to that part of the injunction relating to interference, by pointing out that they would be liable criminally under Section 2, Tenth, for the violation of Section 2, Third, and obviously because of this, the opinion stated (pp. 543-544):

> "The prohibition against such interference was continued and made more explicit by the amendment of 1934. *Petitioner does not challenge* that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the *company union*. That contention is not open to it in view of our decision in the Railway Clerks' Case, *supra*, and of the unambiguous language of Section 2, Third, and Fourth, of the Act, as amended". (emphasis supplied)

As pointed out the *Clerks* case was decided prior to the passage of Section 2, Tenth.

In referring to the *Clerks* and *Virginian* cases in the opinion in the *Switchmen's* case, Mr. Justice Douglas said at p. 300:

> "In those cases it was apparent that but for the general jurisdiction of the federal courts there would be *no remedy* to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose." (emphasis supplied.)

That portion of the opinion in the case of *Stark v. Wickard*, 321 U. S. 288, at 306-307, cited by the petitioners in their brief (p. 19) simply reaffirms that under the Railway Labor Act jurisdictional disputes between unions were left by Congress to mediation rather than adjudication, but where rights of collective bargaining, created by the Railway Labor Act, contained definite prohibitions of conduct or were mandatory in form, the Supreme Court enforced the rights judicially. The *Clerks* and the *Virginian* cases were referred to by the opinion as authority for this proposition.

Nothing, not already fully considered and passed upon by this Court, is presented by the petition.

Every contention urged by the petitioners as the basis for the granting of the Writ has been considered and ruled upon by the Supreme Court in the *Switchmen, M-K-T* and *Sou. Pac.* cases.

To summarize briefly:

The Switchmen claimed they were being denied the right given them under Section 2, Fourth, to "representa-

tives of their own choosing" by the Board's refusal to split the carrier on the ground that it lacked *discretion* to do so. It was shown that the merits of "less than carrier wide craft voting" was never determined by the Board.

In the present case the petitioners asked the Court to consider acts alleged to amount to coercion because the Board ruled it had no *jurisdiction* to consider acts of this nature preceding an election.

In the present case, as in the *M-K-T* case, one of the problems was the calling of employees for emergency service and the firemen as well as the ORC in the present case asked that certain contractual provisions entered into between the railroad and the union be declared void and that each be declared the sole representative.[9] The only appreciable difference seems to be that in the present case the petitioners claim the effect of these contractual acts were said to be coercive.

Mr. Justice Douglas in tracing the evolution of the 1934 Amendment pointed out the remedies available under Section 5, First (320 U. S. p. 232) relating to a dispute concerning changes in rates of pay, rules and working conditions, not adjusted by the parties in conference.[10]

The opinion states (p. 336):

> "It is clear from the legislative history of Section 2, Ninth, that it was designed not only to help free the unions from the *influence, coercion and control* of the carriers but also to resolve a *wide range of jurisdictional disputes* between unions or between groups of employees. H. Rep. No. 1944, *supra*, p. 2; S. Rep. No.

[9] M K T Case 320 U. S. 326.

[10] Although this remedy *inter alia* was available to the petitioners and although in their letter of protest to the Board they state (R. 29-30) they intended to use it, for reasons best known to themselves, the ORC never availed themselves of it.

1065, 73d Cong., 2d Sess., p. 3. However wide may be the range of jurisdictional disputes embraced within Section 2, Ninth, Congress did not select the courts to resolve them." (emphasis supplied.)

Even though all parties asked judicial interpretation this Court treated the entire matter as a jurisdictional dispute and stated (p. 336):

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts."

The opinion distinguished the *Virginian* and *Clerks* cases upon which the petitioners principally rely, as follows (*M-K-T* case, 320 U. S. p. 335):

> "In the Clerks case and in the Virginian R. Co. case the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these jurisdictional controversies."

In the *Sou. Pac.* case, which this Court said (320 U. S. p. 339) involved the same basic question as present in the *M-K-T* case concerning the demotion of engineers to firemen and the calling of firemen for engineers in emergency service with the additional question as to the right of the Firemen to represent men working as engineers in the handling of individual grievances. The opinion states (p. 342):

> "They point out that Section 2, Third and Fourth, prohibit the carrier from *influencing employees in their choice of representatives.* The argument is that a contract by the carrier with the Engineers giving the latter the exclusive right to represent engineers in the presentation of their individual claims would in

> effect *coerce* all engineers into joining that union in violation of *Section 2, Third and fourth.*" (emphasis supplied.)

Here, as in the present case, the parties claimed the effect of the railroad's contract was coercive in violation of Section 2, Third. However, this Court treated the whole matter as a jurisdictional dispute, the opinion stating at p. 344:

> "We see no reason for differentiating this jurisdictional dispute from the others."

No useful purpose could be served by granting of certiorari in this case. The Court of Appeals for the District of Columbia in granting the motions to dismiss clearly followed the mandate of this Court in the *Switchmen's Union, M-K-T* and *Sou. Pac.* cases. That this Court intended these decisions to finally settle the matters involved in the present case can hardly be disputed.[*]

That the door was finally locked, even where a right given by the Act was claimed to be denied, appears overwhelmingly clear by this Court's decision in the *Brotherhood of Railway and Steamship Clerks v. United Transport Service Employees*, where it was pointed out in the opinion of the Court of Appeals for the District of Columbia, 137 Fed. 2nd, at p. 819, that

> "The employer's refusal in this case to deal with the only labor organization these employees could join and that they did designate as their representative certainly violates both the spirit and the letter of the Fourth paragraph of Section 152."

---

[*] In the Switchmen's case the Court of Appeals reviewed and upheld the Board's certification, which the Supreme Court reversed on jurisdictional grounds, the effect being to leave undisturbed the Board's original certification.

The appellate court at page 819 in upholding the District Court's reversal of the Board's certification stated as follows:

> "We are constrained to hold, therefore, that the Board misinterpreted the law applicable to the facts in this case and that its order dismissing appellee's application to be certified as the bargaining agent for the employees concerned, was contrary to law."

This Court, however, decided the matter on December 6, 1943 (No. 435, 320 U. S. 715), which is quoted in full as follows (per curiam):

> "The petition for writ of certiorari is granted and the judgment is reversed on the authority of General Committee of Adjustment vs. Missouri-Kansas-Texas Railroad Co., 320 U. S. 323; General Committee of Adjustment v. Southern Pacific Company (General Grievance Committee v. General Committee of Adjustment), 329 U. S. 338; and Switchmen's Union of North America v. National Mediation Board, 320 U. S. 297, decided November 22, 1943."

On January 10, 1944, the Supreme Court denied a petition for rehearing (No. 435, 320 U. S. 816).

CONCLUSION.

No valid reasons have been shown for the granting of certiorari in this case.

It is therefore respectfully submitted that the petition should be denied.

BERNARD M. SAVAGE,
Title Building,
Baltimore, Maryland,

Attorney for Respondent, Brotherhood of Railroad Trainmen.

APPENDIX.

The pertinent provisions of the Railway Labor Act of 1926, 45 Stat. 477, as amended in 1934, 48 Stat. 1185, 45 U. S. C., Secs. 151, *et seq.*, read as follows:

Section 2. * * *

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

* * * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representa-

tives in such manner as shall insure the choice of representatives by the employeees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment; for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to

make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

FUNCTIONS OF MEDIATION BOARD

"Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused. * * *"

* * * * * * *

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."